MOTION FILED
OCT 19 1977

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-436

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION,
MICROWAVE COMMUNICATIONS, INC., and
N-TRIPLE-C, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE FOR THE STATE PUBLIC SERVICE COMMISSIONS OF THE DISTRICT OF COLUMBIA, VIRGINIA, AND WEST VIRGINIA

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The state public service commissions of the District of Columbia, Virginia, and West Virginia, (Commissions) pursuant to Rule 42 of the Rules of this Court, respectfully move to file the attached Brief Amici Curiae in the captioned case. Petitoner has consented to the filing of this Brief. Respondents have not consented.

Under their respective organic statutes, the Commissions regulate, *inter alia,* the rates and charges for intrastate telephone service.[1] Consonant with their legislative mandate, the Commissions have pursued regulatory policies expressly designed to make basic local telephone service

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[1] D. C. Code, Art. 43, ch. 1-10 (1973); Code of Va., § 56-232 et seq.; W. Va. Code, § 24-2-1. 2, 3, 4 and 7 (1976 repl. vol.).

affordable by every resident. In recent years, a major factor which has enabled the Commissions to maintain the rates for basic residential telephone service substantially below cost has been the revenue support flowing from interstate telephone toll service (*i.e.*, "long distance" service) provided by established carriers. That revenue support will be significantly eroded if long distance services such as Execunet are provided by "specialized common carriers" such as MCI Telecommunications Corporation. The consequent diversion of interstate revenues to such specialized carriers will not reduce the established carriers' costs of providing "local" service, but will decrease significantly the revenue base defraying a portion of local service costs, thereby precipitating an increase in basic residential telephone rates.

The Commissions, by statute, are charged with the duty of ensuring their constituents the availability of adequate telephone service at reasonable rates. It is that interest which is directly at stake in this case.

Only after carefully analyzing the petitions for a writ of certiorari filed by the Federal Communications Commission and others [2] and the Brief Amicus Curiae filed by the National Association of Regulatory Utility Commissioners did the Commissions conclude that inadequate attention had been given to a compelling reason why this Court should grant the petitions for a writ of certiorari and reverse the Circuit Court of Appeals' decision. No petitioner or amicus curiae, to date, has focused on the fact that the Circuit Court of Appeals' decision will undermine *at the state level* furtherance of the Congressional mandate that regulation should promote "rapid, efficient, nationwide" telephone service "at reasonable charges." (47 U. S. C. § 151.) Contrary to the intent of Congress and

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[2] See *American Telephone and Telegraph Co.* v. *MCI Telecommunications Corporation, et al.*, Oct. Term, 1977, No. 77-421; *United States Independent Telephone Ass'n* v. *MCI Telecommunications Corporation, et al.*, Oct. Term, 1977, No. 77-420.

the public interest sought to be served by regulation, the unwitting proliferation of Execunet-type services will seriously erode state regulatory policies designed to foster universally affordable basic telephone service, the *sine qua non* of the interstate toll network. Thus, the questions presented by the petitions are of such far-reaching importance that they should be settled by this Court.

Accordingly, the Commissions request that this Court grant leave to file the attached Brief Amici Curiae.

Respectfully submitted.

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BRIEF AMICI CURIAE FOR THE STATE PUBLIC SERVICE COMMISSIONS OF THE DISTRICT OF COLUMBIA, VIRGINIA, AND WEST VIRGINIA

The state public service commissions of the District of Columbia, Virginia, and West Virginia (Commissions) respectfully request that this Court issue a writ of certiorari in the captioned case and in the two companion fil-

ings,[1] each of which seeks review of the judgment entered by the Court of Appeals for the District of Columbia Circuit in *MCI Telecommunications Corporation* v. *Federal Communications Commission* (*Execunet* decision).

INTEREST OF AMICI CURIAE

In the decision below, the Circuit Court of Appeals held that the Federal Communications Commission erred in finding that MCI's Execunet service (essentially ordinary long distance service) exceeded its certificate authority (which the FCC construed to limit MCI to providing only "private line" service). In reversing the FCC, the Court found lacking any affirmative determination justifying the claimed certificate restriction and concluded that "[o]nly if the Commission has determined that the public convenience and necessity may require that new services receive advance approval can it then reject a tariff as unauthorized." (Slip Opinion, p. 32.) The impact of this decision reaches far beyond the perimeter of the FCC's interstate sphere. Here lies the interest of the Commissions as amici curiae.

The resolution of the issues presented to this Court by the petitions ineluctably involve the interests of local telephone subscribers and state regulators of intrastate telephone services. Whether one calls it subsidy, value of service, or social engineering, the fact of the matter is that substantial benefits flowing out of the interstate operations of established carriers have been bestowed upon the user of local exchange service (basic service). Thus, a fundamental and pervasive public policy objective of making telephone service universally available has been achieved in large part because a significant amount of revenue from

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[1] *American Telephone and Telegraph Company* v. *MCI Telecommunications Corporation, et al,* October Term, 1977, No. 77-421; *United States Independent Telephone Association* v. *MCI Telecommunications Corporation, et al.,* October Term, 1977 No. 77-420.

the established carriers' interstate long distance telephone rates has been made available to defray local exchange costs. Such pricing policies evolved as part of a comprehensive regulatory scheme made workable only through the interaction of federal and state regulators.

The Commissions, on behalf of their constituency, the local telephone subscribers, possess a vital interest in the continuance of pricing policies aimed at maximizing the availability of basic service. To the extent that basic rates must be increased because potential interstate revenue contributions are lost to Execunet-type services, the Commissions' pursuit of affordable basic residential service will be thwarted. Accordingly, the Commissions possess a keen and direct interest in the outcome of the *Execunet* case.

ARGUMENT

In reversing the Federal Communications Commission's *Execunet* decision, the District of Columbia Circuit Court of Appeals has set asunder the Congressionally mandated public interest objective of assuring that "all the people of the United States [have] . . . rapid, efficient, nationwide . . . communications service . . . at reasonable charges. . . . " (47 U. S. C. § 151), an objective which state regulators play an essential role in achieving. The questions presented by the petitions [2] are of such far-reaching importance that they should be settled by this Court.

If the lower court's conclusions prevail, a long-established, comprehensive regulatory scheme of telecommunications stands in jeopardy. With the paramount "purpose" of regulation directed toward the availability of universal

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[2] In this Brief Amici Curiae, the Commissions will not duplicate the arguments advanced by the Federal Communications Commission (FCC), the American Telephone and Telegraph Company (AT&T), and the United States Independent Telephone Association (USITA), in their respective petitions for a writ of certiorari and the arguments furthered bq the National Association of Regulatory Utility Commissioners (NARUC) in its brief Amicus Curiae.

service, regulation of interstate commerce under the Communications Act of 1934 has developed with a view of the telephone network as an economically and technically integrated whole. A regulatory purpose of such pervasive scope could, of course, not be achieved without the cooperative efforts of the States in ther regulation of local telephone service—universal telephone service could only be approached through the gateway of the local exchange.

The pre-eminence of basic telephone service in this comprehensive regulatory scheme is as much a cause as a product of the process. It must be remembered that public utility regulation grew out of not only economic concerns directed at "natural monopoly characteristics" but also social concerns. As the old English case law put it, utility companies are "affected with a public interest." Indeed, basic telephone service has become essential to the maintenance of life in our contemporary society. It is essential not only to the individual, but to the commonweal as an adjunct to public services such as police, fire and medical services.

"To ensure affordable basic service" thereby is an oft-repeated design running through the federal and state mosaic of telephone utility regulation. This policy objective is distinctly reflected in the process of allocating joint costs [3] between interstate and intrastate operations where "separations" procedures [4] have been developed to allocate more of the local exchange joint costs to the interstate jurisdiction. Because separations of jointly used resources are

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[3] The classic textbook example of this problem is how to allocate the costs of joint production of beef and hides. Here, the joint costs are incurred in providing several services from common facilities. For example, the same terminal equipment is used to provide interstate toll (long distance) and local exchange services.

[4] The current Separations Manual is a "Rule" prescribed by the FCC. 47 CFR 67.1 et seq.; *Separations Procedures*, 16 FCC 2d 317, 331 (1969); Prescription of Separations Procedures, 26 FCC 2d 247, 157 (1970). The FCC acitvely involved state regulators as vital partners in resolving these issues of mutual concern. See 26 FCC 2d at 248.

inherently arbitrary in economic theory, jurisdictional separations have become a flexible instrument of the industry and its regulators in furthering the overriding public policy objective of universal service.

To illustrate the benefits received by local exchange service under current separations formulae: In the District of Columbia, 37.3% of all local exchange plant costs for 1976 were allocated to interstate operations. On an actual use basis, however, interstate use accounts for only 11.48% of the total (interstate and intrastate) use of the local exchange facilities. Thus, in the separations process interstate use becomes "weighted" by a factor of 3.25,[5] thereby providing significant benefits to District of Columbia residential telephone subscribers. Conversely, the adverse impact of any diversion of interstate use from the established carrier to a specialized carrier is likewise weighted threefold. That is to say, for each percentage point reduction in the interstate use of the established carriers system, there will be a shift of 3.25% of local excange costs to intrastate operations to the detriment of the local user.

But the above only illustrates the direct and immediate impact of the *Execunet* decision. If competition in the interstate arena becomes entrenched such that the competitive market dictates the pricing of interstate service rather than the social policies recognized in the current allocations precedures, the separations formula itself becomes subject to adjustment, again to the detriment of the local subscribers. This because, in a competitive environment, the established intrastate-interstate carrier may no longer be able to share with its intrastate operations the benefits derived from interstate economies of scale.

Still another endangered regulatory policy designed to foster universal service is rate averaging. Here, the objective is to share the economies of scale realized over the

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[5] Under current separations procedures, weighting factors in excess of three are likewise realized by Virginia and West Virginia.

high traffic density routes with the high cost, low density routes so as to make the latter affordable. The adverse affect on that policy resulting from the injection of an overdose of competition into long distance toll service is manifest. As former District of Columbia Public Service Commissioner George A. Avery observed:

> Nationwide averaging of [Bell] system costs [is] used in order to bring telephone service within the economic means of the largest number of people possible; the Bell system calls this "value of service" pricing. Whatever the label for the situation, the fact remains that as competitive forces in the telecommunications industry siphon off the more lucrative, lower-cost, high usage urban business customer, the Bell system must seek recovery of those lost revenues by raising rates for other services, including telephone services to residential customers and to less densely populated areas. (Footnote omitted.) (Avery, "Social and Economic factors in Rate Design," 1975 Annual Report of the ABA Section on Public Utility Law 48, 68.)

Clearly, because of the comprehensive regulatory scheme of public policy running across the interstate and intrastate jurisdictions, an unavoidable result of the Court of Appeal's decision in the *Execunet* case will be to increase local basic rates to the detriment of the public interest. The Court of Appeals disclaims any assumption as to whether "competition like that posed by Execunet is in the Public interest." (Slip Opinion, p. 32.) However, the anomalous effect of the Court's decision is that the FCC, the very agency delegated the task of determining the public interest in the first instance, has unwittingly authorized Execunet-type services without any occasion to affirmatively and definitively consider the public interest implications of such applications for competitive long distance service. In short,

the Court below has turned on its head the "public interest" standard which this Court has held must be applied [6] and which Congress has mandated. This Court should not leave standing such a far-reaching departure from Congressional intent and such an aberration of governing legal standards.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petitions for a writ of certiorari filed by the FCC, AT&T, and USITA, the Commissions respectfully request that this Court grant those petitions and upon due consideration, reverse the decision of the Court of Appeals.

Respectfully submitted.

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[6] *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. 86 (1953).